

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

MOREHEAD V. MOREHEAD

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

SUZANNE M. MOREHEAD, APPELLANT,
V.
JAMES R. MOREHEAD, APPELLEE.

Filed April 24, 2012. No. A-11-722.

Appeal from the District Court for Gage County: DANIEL E. BRYAN, JR., Judge.
Affirmed.

Chris A. Johnson, of Conway, Pauley & Johnson, P.C., for appellant.

Jerry L. Shelton for appellee.

MOORE, CASSEL, and PIRTLE, Judges.

CASSEL, Judge.

INTRODUCTION

Suzanne M. Morehead appeals from the decree dissolving her marriage to James R. Morehead. She contends that the district court erred in neglecting its duty to deliberate before making a final ruling, failing to equitably divide the marital estate, considering James' payments to repay a loan from his 401K as an appropriate deduction from income in calculating child support, terminating temporary alimony, assigning to her an earning capacity greater than her actual income, and awarding inadequate alimony. Because we find no abuse of discretion by the court in its determinations, we affirm.

BACKGROUND

The parties married in August 1979, and eight children were born to the marriage. Suzanne filed a complaint for legal separation in February 2007 and filed the operative complaint for dissolution of marriage in March 2009. Trial commenced in July 2011. At that time, only three of the parties' children remained minors, the youngest of which was almost 8 years old.

The parties married when Suzanne and James were ages 19 and 23, respectively. At that time, James was a mechanic and Suzanne had not pursued any postsecondary education. James later secured employment with United Parcel Service (UPS), where he has continued to work as a mechanic for approximately 25 years. Suzanne testified that James always wanted her to be a stay-at-home mother and that she primarily took care of the children and performed all of the cooking and housekeeping.

Suzanne acquired a real estate license in 1990 or 1991 and worked as a real estate agent for approximately 14 years, but she was never able to pursue a full-time career in real estate. She testified that she generally earned, after expenses, \$5,000 to \$10,000 a year and that her best year resulted in income of approximately \$12,000 to \$14,000. Apparently, her 2005 and 2006 tax returns reflected gross income in excess of \$20,000. At the time of trial, her license was inactive and she would need to complete 12 hours of continuing education to reinstate her license to active status. Suzanne testified that she had neither the time nor the energy to complete the necessary education.

Suzanne engaged in other activities to earn money during the marriage. She provided in-home daycare and held a seasonal sales job, but she testified that the most money she made after expenses was “probably [\$]5,000 or even took a loss.” She worked the seasonal job from July to December for approximately four seasons and testified that she was very successful. In 2006, Suzanne began selling cosmetic products on a commission basis. She initially earned \$1,000 to \$1,500 a month, but her earnings had decreased. The most she had made selling such products, after expenses, was around \$2,000 to \$3,000. Suzanne testified that selling the cosmetic products required her to invest money in the products and to travel to different seminars. She testified that she had not actively sold the products in the last 3 years, but that she was a consultant and had clients who continued to buy products from her.

At the time of trial, Suzanne was employed by her attorney’s law firm as a legal assistant. She earned \$9.50 an hour and was working part time because “[a]fter paying for full-time daycare, it did not pay me to work.” Suzanne testified that she also cleaned houses for three clients, working 4 hours each Tuesday and Wednesday and receiving \$60 per day.

James has a 401K account through his employer. The value of the 401K as of July 6, 2011, was \$36,143.35. In 2006, the parties borrowed \$31,000 from the account, with the payoff amount being \$38,747.80. Since November 2006, \$149.03 has been withdrawn from James’ pay each week to repay the loan. Suzanne testified that the monthly payment was \$645 or \$693. The loan was scheduled to be paid off in November 2011. James also made \$39,406.66 of withdrawals--not loans--from the 401K since the parties’ separation. A listing of the withdrawals classified each as a “[h]ardship” transaction. James testified that he made these withdrawals after receiving a notice of default on the marital home and that the funds were used to make him current on the house payments and to pay the taxes and penalty. Suzanne asked the court to add the amount of the withdrawals to the 401K’s current value. James testified that the amount of the 401K loan--which he had been solely repaying--was roughly the same as the hardship withdrawals, and he asked the court to not add the hardship withdrawals back into the 401K when determining its value.

The parties disagreed about the value of the marital home in Beatrice, Nebraska. James valued the home at \$124,650, while Suzanne valued it at \$138,500--the amount arrived at by a

July 2009 appraisal. Suzanne, who had sold real estate in Beatrice for approximately 14 years, was shocked at the appraised value and felt that it should have been much higher. Suzanne testified that the home was appraised in 2006 or 2007 for \$155,000 and that approximately \$30,000 of work had been performed on it since that time. She testified that shortly after she gave James a quitclaim deed in May 2011, he informed her that he wanted to lower the value of the home down from \$138,500. The parties had purchased carpet for the upper two levels and tile for two bathrooms, but it had not been installed at the time that Suzanne left the home. She did not know whether that work had been completed at the time of trial but believed that it had. The home had undergone extensive remodeling, but more work remained. Suzanne felt that it was 80- to 85-percent complete. James testified that virtually all of the woodwork was off and that a stairwell needed to be finished. Keith Krecklow, a real estate broker and previously a licensed appraiser, viewed the property on July 6, 2009. His estimate of value was based on the remodeling work being completed. The appraisal specifically stated that the value was “[s]ubject to floor coverings being put down and stairway finished.” Krecklow testified that he viewed the property on the day before trial and determined its current value to be \$115,000 to \$118,000.

After both parties rested, the court dictated the order from the bench. As to child support, the court stated that it would use \$2,080 for Suzanne’s gross monthly income and that James’ income until November 2011 would be \$5,500. The court stated that for December and thereafter, James’ gross income would “increase with the added income from the full payment of all that loan” and that he “gets a standard retirement deduction from the child support.” The court awarded each party the personal property in his or her possession as displayed on the joint property statement. Two minutes after adjourning, the court stated that the record should reflect that the 401K would be divided equally as of the value of July 7, 2011.

The district court later entered a decree dissolving the marriage. Thereafter, the parties filed a joint motion for “nunc pro tunc decree” because the decree did not address James’ pension plan or health insurance for Suzanne and because “[t]he [d]ecree signed by the [c]ourt was a draft sent to the [c]ourt for comments, it had not yet been approved by counsel for [Suzanne], was not meant to be signed, and should be disregarded.” On August 18, 2011, the court entered a “decree of dissolution of marriage nunc pro tunc.” The court awarded Suzanne custody of the three minor children. It ordered James to pay child support of \$1,218 per month on August 1, September 1, October 1, and November 1. Commencing December 1, James’ child support obligation would increase to \$1,370 per month for the three children. The court awarded James the Beatrice residence subject to all indebtedness thereon. The court determined that a money judgment of \$10,000 should be entered against James and in favor of Suzanne to equalize division of the marital assets. The court awarded Suzanne a one-half interest in the amount of \$18,071.67 in James’ 401K, based on a total valuation of \$36,143.35 as of July 7. It also awarded Suzanne 50 percent of James’ pension benefits through his employment with UPS that had accrued as of July 31, 2011. Finally, the court ordered James to pay alimony of \$500 per month for 7 years or until Suzanne’s remarriage or death.

Suzanne timely appeals. Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

ASSIGNMENTS OF ERROR

Suzanne assigns that the district court erred in (1) neglecting its duty to deliberate before making a final ruling, (2) failing to equitably divide the marital estate, (3) considering payments made by James to repay the loan from his 401K as a proper deduction from income for purposes of a child support calculation, (4) terminating temporary alimony, (5) awarding an inadequate amount of alimony for an inadequate amount of time, and (6) assigning to her an earning capacity greater than her actual income.

STANDARD OF REVIEW

An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees. *Klimek v. Klimek*, 18 Neb. App. 82, 775 N.W.2d 444 (2009).

ANALYSIS

Deliberation.

Suzanne assigns that the district court neglected its duty to deliberate before ruling. She argues that “[i]t is unlikely that the court could equitably divide the marital property and decide complicated issues such as child support and alimony calculations in less than ten minutes.” Brief for appellant at 19. However, Suzanne cites no authority for the proposition that there is some specific time requirement for a court's deliberation or any prohibition against ruling from the bench. That is because no such requirement or prohibition exists.

The root of Suzanne's complaint about the judge's decisional process is that “the parties do not know how the court came up with its decision.” Brief for appellant at 23. But Suzanne defeats her own argument by citing the proposition that while a trial judge need not give his or her reasons for reaching a decision, justification of the decision must be one that can be established from the record. See *Bryant v. Greene*, 166 Neb. 520, 89 N.W.2d 579 (1958).

Our review for an abuse of discretion in the division of the parties' property recognizes that there is no single correct answer and that numerous outcomes are permissible within a range of possible solutions. A judicial abuse of discretion exists when a judge, acting within effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives the litigant of a substantial right or a just result. *Mandolfo v. Mandolfo*, 281 Neb. 443, 796 N.W.2d 603 (2011). This rule contemplates more than one possible decision. And the rule governing division of marital property allows a broad range of possible outcomes. The division of property is not subject to a precise mathematical formula, but the general rule is to award a spouse one-third to one-half of the marital estate. *Meints v. Meints*, 258 Neb. 1017, 608 N.W.2d 564 (2000). Thus, Suzanne seeks a degree of precision that our jurisprudence simply does not require.

Although Suzanne does not cite the decision in *Brunges v. Brunges*, 260 Neb. 660, 619 N.W.2d 456 (2000), we observe that the *Brunges* circumstances were significantly different and that the case merely stands for the proposition that a dissolution court cannot simply make a general finding for one party and leave it to that party to “fill in the blanks”--the court must make

appropriate orders on the contested issues. In *Brunges*, the trial court sent an e-mail to the parties' attorneys stating that it found generally in favor of the husband and against the wife and asking the husband's attorney to submit a journal entry. The wife argued on appeal that "the trial court erred in signing the dissolution decree without reading it or determining whether it accurately set forth the findings and orders of the court." *Id.* at 669, 619 N.W.2d at 463. The Nebraska Supreme Court disapproved of the trial court's failure to make any independent findings.

The instant case does not present a similar situation. Here, the district court orally made many factual findings before asking counsel to prepare a decree consistent with its findings. In doing so, it did not delegate its responsibility to adjudicate the issues.

Further, the record does not reflect that Suzanne asked the court to make specific findings of fact. See, Neb. Rev. Stat. § 25-1127 (Reissue 2008); *Brooke v. Brooke*, 234 Neb. 968, 453 N.W.2d 438 (1990). And as the Supreme Court observed with respect to the failure to make specific findings of fact in a dissolution of marriage action, "although such findings are unquestionably desirable and helpful in focusing [appellate] review, [the failure to make such findings] cannot be prejudicial inasmuch as [an appellate court] must in any event review the trial court's judgment de novo on the record to determine whether that court abused its discretion." *Id.* at 969, 453 N.W.2d at 439. Suzanne's first assignment of error lacks merit.

Division of Marital Estate.

Suzanne argues that the court failed to equitably divide the marital estate in three respects.

First, she contends that the court should have required James to reimburse her for over \$39,000 in withdrawals from his 401K that he made during the pendency of the proceedings. The record shows that James made 11 "[h]ardship" transactions totaling \$39,406.66 between April 8, 2009, and April 20, 2011. James testified that he made the hardship withdrawals after receiving a notice of default on the marital home and that the funds were used to make him current on his house payments and to pay the taxes and penalty. He testified that the notice of default was required "by [his] 401[K] before [he] could withdraw it." Suzanne testified that she had no reason to question that the money had been used to make the house payments, but that she "ha[d] no idea what [James] spent his money on."

It appears that Suzanne is implicitly asserting an argument of dissipation of marital funds, but that concept does not apply to the case before us. As a general rule, all property accumulated and acquired by either spouse during a marriage is part of the marital estate. *Reed v. Reed*, 277 Neb. 391, 763 N.W.2d 686 (2009). The money in the 401K was accumulated during the marriage and is part of the marital estate. Suzanne does not specifically claim that James "dissipated" the 401K funds, and we agree that his use does not fall within that definition. "Dissipation of marital assets" is defined as one spouse's use of marital property for a selfish purpose unrelated to the marriage at the time when the marriage is undergoing an irretrievable breakdown. *Id.* Marital assets dissipated by a spouse for purposes unrelated to the marriage should be included in the marital estate in dissolution actions. *Id.* The withdrawals occurred after Suzanne had filed for divorce, so clearly they were made at a time when the marriage was undergoing an irretrievable breakdown. But James argues that his withdrawals did not constitute a dissipation of marital

assets because the money was used to make house payments in order to preserve a marital asset. We cannot say that James' use of the funds was for a selfish purpose unrelated to the marriage because the funds were used to pay a marital expense. Because the house remains a part of the marital estate, the evidence does not establish that James' withdrawals to preserve the asset diminished the total value of the marital estate.

The Nebraska appellate courts have considered situations where one party has withdrawn marital funds and claimed such funds were used to pay marital debt. In *Brunges v. Brunges*, 260 Neb. 660, 619 N.W.2d 456 (2000), the husband obtained a distribution of his retirement account, which he testified was used to pay bills, but he did not provide testimonial or documentary evidence as to the specific bills paid. The Nebraska Supreme Court stated that "[w]ithout substantiation by receipts, canceled checks, or other evidence, the testimony of that party that he or she spent or otherwise disposed of the assets is not sufficient to support such allegation." *Id.* at 667, 619 N.W.2d at 462. Thus, the Supreme Court determined that the trial court erred in not including the asset in the marital estate because the husband had not properly accounted for the funds. Similarly, in *Halouska v. Halouska*, 7 Neb. App. 730, 585 N.W.2d 490 (1998), the husband spent the funds in two marital brokerage service accounts during the pendency of the divorce, which funds he testified were used to pay marital debts. The trial court awarded the husband the accounts at their full value at the time of separation, and we affirmed. We reasoned that "[a]pparently, the trial court either was not satisfied with the accounting [the husband] gave at trial or did not believe the credit card debts paid per [a computer printout generated by the husband which showed that he spent approximately \$3,675 servicing credit card debts] were proper marital debts." *Id.* at 745, 585 N.W.2d at 502. In *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001), the husband withdrew nearly \$50,000 from a savings fund during a period when the parties were estranged. Through testimonial and documentary evidence, the husband was able to account for spending nearly \$31,000 on marital expenses. On appeal, the Nebraska Supreme Court determined that rather than finding that the entire amount had been dissipated and should be included in the marital estate, the trial court should have deducted the amount which was used for marital expenses.

James sufficiently proved that his use of the funds was to pay a marital debt. The record contains an exhibit showing each of the hardship withdrawals, and James testified that the withdrawals were used in an attempt to become current on the mortgage payments for the marital home. The record also contains the April 13, 2011, notice of default which stated that \$4,476.60 was required to reinstate the mortgage due to nonpayment of the January 1 installment and that the total amount due in payments and fees on May 13 was \$5,624.27. Certainly James could have provided more documentary support for his use of the funds, but Suzanne did not dispute at trial that the funds were used by James to make house payments. We conclude that the court did not abuse its discretion in declining to add back to the 401K account the amount of the hardship withdrawals.

Second, Suzanne argues that the court erred in failing to give her credit for marital debts she paid from separate moneys during the pendency of the proceedings. The separate moneys to which Suzanne refers is "her child support, alimony, and earnings she made post separation." Brief for appellant at 27. We disagree with Suzanne's characterization of such money as separate property. The marital relation continues during the entire pendency of a dissolution of marriage

decree. See *Brunges v. Brunges*, 260 Neb. 660, 619 N.W.2d 456 (2000). And as we stated above, generally all property accumulated and acquired by either spouse during a marriage is part of the marital estate. See *Reed v. Reed*, 277 Neb. 391, 763 N.W.2d 686 (2009). Thus, this money was marital property even though the parties were separated. Moreover, Suzanne conceded at trial that James was the source of the funds that she used for the debt reduction. We find no abuse of discretion by the court in declining to give her credit for using marital funds to pay marital debts.

Third, Suzanne claims that the court erred in its division of the marital estate. The purpose of a property division is to distribute the marital assets equitably between the parties. *Klimek v. Klimek*, 18 Neb. App. 82, 775 N.W.2d 444 (2009). The equitable division of property is a three-step process: (1) The first step is to classify the parties' property as marital or nonmarital, (2) the second step is to value the marital assets and liabilities of the parties, and (3) the third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in the statute governing division of marital property. *Id.* The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. *Thompson v. Thompson*, 18 Neb. App. 363, 782 N.W.2d 607 (2010).

Like in *Klimek v. Klimek*, 18 Neb. App. at 89, 775 N.W.2d at 451, the district court in the instant case did not include a balance sheet, which "is typically helpful in demonstrating that the three-step process has been followed and that the division ordered comports with the applicable law." Thus, like in *Klimek*, we will construct our own table to illustrate the division of the marital estate as ordered by the trial court. Where the parties did not agree on a value, we will use the average of their two values.

	James	Suzanne
Personal property in possession	\$ 8,587.50	\$ 5,162.50
2001 van		3,210.00
1997 Cadillac	1,250.00	
Boat (one-half interest)	4,500.00	
Residence	131,575.00	
UPS stock	667.00	
UPS 401K	18,071.67	18,071.67
UPS/IBT pension	<u>50%</u>	<u>50%</u>
	164,651.17	26,444.17
Residential debt--Wells Fargo	(109,009.26)	
Residential debt--TierOne	<u>(9,233.82)</u>	
	46,408.09	26,444.17
Equalization payment	<u>(10,000.00)</u>	<u>10,000.00</u>
	\$ 36,408.09	\$36,444.17

Suzanne argues that the court erred in refusing to equitably divide the parties' personal property in accordance with their agreement. At trial, the court received a joint property statement in which the parties listed various assets and debts, whose possession each asset was in, the parties' opinions as to value, and which party would like to receive the asset. At the beginning of trial, Suzanne's counsel informed the court that "for the most part, those items

where the parties agree on price, the parties have agreed to those [sic] items should remain in the respective possession of the person that has those items at this time.” With regard to the items upon which the parties could not agree on a value, Suzanne’s position was that whoever placed the higher value on the item should be awarded the item at that value. James testified at trial that Suzanne could have some of these various items at the value that she placed upon the items if he could have the “cash in [his] pocket.”

The parties’ joint property statement contains a section identifying 75 personal property items. The parties did not agree upon the value of 17 of those items. Suzanne placed a greater value on a stove and water softener, and thus, she contends that she should have been awarded those items. But James testified that those items are attached to the house: An opening was cut through the wall of the house for the stove’s exhaust and the water softener was attached to the plumbing. Suzanne testified that such fixtures are a bargaining tool in selling real estate and that she could find somebody to uninstall the water softener. The term “fixture” refers to a chattel which is capable of existing separately and apart from realty, but which, by actual annexation and appropriation to the use or purpose of the realty with the intention of making it a permanent accession thereto, becomes a part of the realty. *Copple Constr. v. Columbia Nat. Ins. Co.*, 279 Neb. 60, 776 N.W.2d 503 (2009). Because the stove and water softener are attached to the house, we find no abuse of discretion by the court in awarding these items, along with the house, to James.

Suzanne also placed a greater value on tools. She did not have the tools appraised. As a mechanic, James accumulated and upgraded tools during the marriage, and he is familiar with the value of used tools, having seen the prices for which they are sold during auctions. James testified that most of the tools were around 20 years old. Further, he used the tools in his employment and would have to replace them if they were awarded to Suzanne. We find no abuse of discretion by the court in awarding James the tools.

Suzanne also identified a few items as gifts. She testified that her sister gave her the children’s bunk bed sets and that the master bedroom furniture was a gift from her mother. James did not know where the master bedroom furniture came from. On the joint property statement, Suzanne identified concrete flower pots as a gift from her mother, but no testimony was adduced about this item. The burden of proof to show that property is nonmarital remains with the person making the claim in a dissolution proceeding. *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006). James did not testify that any of these items were gifts, leaving a conflict in the evidence. The district court did not treat the items as nonmarital property, and we cannot say that failing to do so was an abuse of its discretion.

The parties did not agree on the value of other items of tangible personal property, which we do not list in the interest of brevity. They also disagreed about the value of vehicles and the marital home. Although the division of property is not subject to a precise mathematical formula, the general rule is to award a spouse one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case. *Id.* As we set forth above, the district court’s division of property and equalization payment resulted in a near equal division. We find no abuse of discretion by the court in its division of the marital estate.

Determination of Child Support.

Suzanne argues that the court erred in considering payments made by James to repay the loan from his 401K as a proper deduction from income for purposes of the child support calculation. In general, child support payments should be set according to the Nebraska Child Support Guidelines. *Incontro v. Jacobs*, 277 Neb. 275, 761 N.W.2d 551 (2009). Deviations from the guidelines are permissible “whenever the application of the guidelines in an individual case would be unjust or inappropriate.” Neb. Ct. R. § 4-203(E) (rev. 2011). “In the event of a deviation, the reason for the deviation shall be contained in the findings portion of the decree or order, or worksheet 5 should be completed by the court and filed in the court file.” § 4-203. Suzanne argues that “the court improperly created a deduction in income” because “there is no ‘findings’ portion of the decree, or a worksheet 5 in the court file.” Brief for appellant at 30. The decree states in part as follows:

In setting the amount of child support herein, the [c]ourt has considered a 401[K] loan repayment withheld from [James’] earnings in the amount of \$645.80 per month until November, 2011 and the [c]ourt has taken such 401[K] loan repayment into consideration in determining the child support herein for the months of August, September, October, and November, 2011 which the [c]ourt believes represents an appropriate deviation from the Nebraska Child Support Guidelines. The [c]ourt has also considered the child support calculations attached herewith and made a part of this [d]ecree and the guidelines provided by the Nebraska Supreme Court for the establishment of child support obligations.

The court’s finding explained the reason for the deviation. Further, the deviation will affect James’ child support obligation for only 4 months. Under the circumstances, we find no abuse of discretion by the court in allowing this deviation.

Terminating Temporary Alimony.

Suzanne claims that the court abused its discretion in terminating her temporary alimony. An order for the payment of temporary alimony may be set aside on a proper showing by the court which rendered it, as the circumstances may warrant. See *Cain v. Miller*, 109 Neb. 441, 191 N.W. 704 (1922). In August 2008, the court awarded Suzanne temporary alimony of \$1,200 per month. In May 2009, James filed an application for modification of the temporary alimony. In the application, James stated that Suzanne was living in the marital home at the time of her application for temporary support, but that she moved to Hastings, Nebraska, soon after entry of the court’s order and that James had largely assumed the house payments that Suzanne had listed in her affidavit for temporary support. The court subsequently entered an order, ending James’ temporary alimony obligation effective July 31 and ordering James to pay the monthly payments on the mortgage debt against the marital home.

The bill of exceptions does not contain the hearing on James’ application to modify his support obligation or any evidence received. The court’s order terminating James’ temporary alimony obligation stated that it received two rebuttal affidavits. “An appellate court obviously cannot conduct a de novo review ‘on the record’ where there is no record of that portion of a proceeding to which error is assigned.” *In re Interest of Tyler T.*, 279 Neb. 806, 809, 781 N.W.2d 922, 924 (2010). It is incumbent upon the appellant to present a record supporting the errors

assigned, and, absent such a record, an appellate court will affirm the lower court's decision regarding those errors. *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009). Because Suzanne did not make this hearing and evidence part of the record on appeal, we affirm the district court's termination of temporary alimony.

Alimony.

Finally, Suzanne challenges the award of alimony. The court ordered James to pay alimony of \$500 a month for 7 years. And in discussing child support, the court stated that it found Suzanne's gross income per month would be \$2,080. Suzanne contends that both the amount and duration of the award were insufficient and that the court should not have assigned her an earning capacity over her actual income.

In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. *Thompson v. Thompson*, 18 Neb. App. 363, 782 N.W.2d 607 (2010). Factors which should be considered by a court in determining alimony include: (1) the circumstances of the parties; (2) the duration of the marriage; (3) the history of contributions to the marriage, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities; and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party. *Id.* In considering those factors, a court's polestar must be fairness and reasonableness as determined by the facts of each case. See *Klimek v. Klimek*, 18 Neb. App. 82, 775 N.W.2d 444 (2009).

At the time of trial, James was 55 years old and Suzanne was approximately 51 years old. James was gainfully employed full time; Suzanne was working part time. Their marriage was of long duration, lasting approximately 32 years. At the time of trial, the parties' three minor children were ages 12, 10, and almost 8, and Suzanne was awarded their custody. It appears that James consistently worked full time throughout the marriage. For the most part, Suzanne stayed home to raise the parties' eight children and maintain the family home, but she also obtained a real estate license and engaged in seasonal and part-time work.

A court is to consider the income and earning capacity of each party, as well as the general equities of each situation. *Klimek v. Klimek, supra*. Suzanne testified that James' gross income was approximately \$5,300 a month and that he received \$400 a month in rental income. In late 2009, Suzanne was earning \$9.50 an hour working full time at the law firm, but she decided to reduce her hours to part-time employment due to the cost of daycare. She also earned \$120 a week cleaning houses. Further, she continued to earn money each month selling cosmetic products, having gross earnings of \$1,561.73 from January to June 2011, or approximately \$260 per month. Suzanne has demonstrated that she has the capacity to earn income. Although James clearly earns more income, alimony should not be used to equalize the incomes of the parties. See *id.* We cannot say that the alimony awarded was untenable so as to deprive Suzanne of a substantial right or just result. Accordingly, the court's award of alimony was not an abuse of discretion.

CONCLUSION

Upon our de novo review of the record, we have found no abuse of discretion by the district court in any of the respects alleged by Suzanne. Accordingly, we affirm the district court's decree nunc pro tunc.

AFFIRMED.